SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Regulations

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. McKENZIE, Vice Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF THE APPELLANTS.

The purpose of this reply is not to re-argue the case for the Appellants. It is made necessary by Appellees' misstatement of certain of the issues and facts, as well as by the use of certain factual material and court decisions in some of the opposing briefs, particularly in the brief of the Appellees. We will attempt in this reply to cover the more serious deviations.

ARGUMENT.

1. Misstatement of Issues.

The four issues of law submitted by the Plaintiffs (Appellees here) for the District Court's determination, and in turn for determination by the Court of Appeals, were the first four issues set forth in the Pretrial Conference Order (A. 55). These issues, in a slightly abbreviated form, were carried over and considered by the District Judge in his Memorandum for Use in Preparation of Proposed Findings of Fact, Conclusions of Law, and Judgment (A. 342). The same issues are set forth in Appellants' Brief (pp. 4-5).

However, at page 2 of Appellees' Brief, an attempt is made to reshape the issues. A comparison will show substantial deviations from the issues presented for decision.

The greatest variance is found in Appellees' attempted restatement of the Commerce Clause issue. This issue of law, as set forth in the Pretrial Conference Order (A. 55), is stated to be:

> "2. Whether enforcement of the curfew ordinance would result in an intolerable and unreasonable burden on interstate commerce in violation of the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution."

The District Judge, in his Memorandum, abbreviated this issue to read (A. 342):

> "(3) Would the enforcement of the Ordinance result in intolerable and unreasonable burden on interstate commerce?"

The Appellees now state this issue to be (Appellees' Brief, p. 2):

> "4. Does the burden imposed on interstate commerce by enforcement of a local curfew render the Burbank ordinance invalid?"

Appellees give no explanation as to why they are belatedly attempting to change this issue. We are involved here with the Burbank Ordinance, not with the ordinance of some other city which *might* impose "an intolerable and unreasonable burden on interstate commerce." This issue, as rephrased by the Appellees, assumes a factual circumstance which finds no support in the record. There is no evidence or finding that the Burbank Ordinance, in its operation and effect, burdened interstate commerce in any respect.[1] The only answer to the issue as presented in the District Court was that it did not.[2] We do not believe that this at-

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[1]The only evidence in the record which could be considered as having any bearing on the issue as submitted to the District Court, is that summarized in Finding of Fact No. 66 (A. 395) which dealt with the possibility of Continental's adding an after-dinner flight from Seattle to Burbank and on to Ontario "should sufficient demand develop." More than two years have passed since Continental introduced service on this route [See Pl. Ex. 42]. Not only has no after-dinner flight been added, but two flights (No. 303 and No. 304) have been cancelled.

[2]The District Judge concedes as much by the statement in his Memorandum (A. 366): "Considered singly, such an Ordinance might not impose an unlawful interference with interstate commerce in all cases." Prior to this he had made the following observation (A. 366): "The evidence shows that if Seattle imposed an ordinance similar to the BuOr no jet aircraft could leave Seattle, or any city in the Northwest, for HBA after 7:00 P.M., nor could a plane depart HBA for Seattle after 7:00 P.M. in order to arrive at the respective destinations before the nocturnal curfew hour of 11:00 P.M." This latter statement is patently erroneous since the Burbank Ordinance only restricted takeoffs, not landings.

tempt by Appellees to divert attention from their failure of proof in this regard should be permitted to go unnoticed.

2. Runway Preference Orders.

Appellees suggest (for the first time) that violation by a pilot of the runway preference order [BUR 7100.-5B] issued by the Chief of the Hollywood-Burbank Airport Traffic Control Tower would subject him "to a civil penalty and to suspension or revocation of his airman's certificate", and would have the Court believe that pilots were required to use the preferential runway established by the order unless deviation was "permitted" by the control tower (Appellees' Br., pp. 13, 66). These misstatements of fact could possibly be overlooked if the order had not played such a prominent part in the decision of the Court of Appeals.

The order in question contains the following provision (A. 454):

> "4. . . . The procedures are *not* mandatory on the part of pilots, however, traffic controllers must be noise abatement conscious and emphasize noise abatement in order to obtain the highest degree of *voluntary cooperation* from pilots." (Italics added).

The same provision is found in the three previous orders (A. 456, 458 and 460). The testimony to which the Appellees make reference is to the same effect (A. 317-318, 322-323).[3]

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[3] *e.g.* "Q. . . . To what extent was it [BUR 7100.5B] observed by the pilots who took off during the period from 11:00 p.m. to 7:00 a.m.?"

"A. [Roman Lemmer, Chief Controller, Hollywood-Burbank Tower] We had very, very good cooperation on the part of the pilots, when we did assign the runway." (A. 317-318).

3. Letter of Secretary of Transportation.

Appellees in their brief (pp. 31-32) and the Port Authority of New York and New Jersey in its brief (pp. 7-9) seek to support their preemption arguments by reference to the first paragraph of the letter of the Secretary of Transportation dated June 22, 1968 included in Senate Report No. 1353.[4] In this letter, the Secretary, after citing *American Airlines v. Town of Hempstead*, 272 F.Supp. 226 (U.S.D.C., E.D., N.Y., 1966), expresses the view that "States and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." Again we turn to the Opinion of the Federal Aviation Administrator in the *Dreifus* matter (Appendix to Appellants' Br., p. 4) for further enlightenment. There the Petitioner argued (p. 5):

> "(6) The exclusive jurisdiction of the FAA in the field of aircraft noise abatement was upheld in the case of *American Airlines, Inc. v. Town of Hempstead*, 272 Fed.Supp. 226 (1966)."

The response of the Administrator was as follows (p. 11):

> "Petitioner's argument 6, implying that the case of *American Airlines, Inc. v. Town of Hempstead* requires that the FAA issue time limitations for the Santa Monica airport is not supportable. While this case stated that noise limiting rules operating as those of the Hempstead ordinance must come from a Federal source, the material quoted from the Senate Report distinguished such ordinances from the action taken, by airport proprietors, to exclude aircraft, using their airports, because of

[4]The letter is set out in full in the Appendix to the Brief of Appellants (pp. 1-2).

> noise considerations. The Hempstead ordinance was not an action taken by an airport proprietor to exclude aircraft from the airport."

We must add that neither was the Hempstead ordinance an action taken by a municipality with respect to the proprietor of an airport located within its boundaries which required the airport proprietor to impose time limitations on jet takeoffs. It would have been more in point if the Administrator had directed the Petitioner's attention to that portion of the District Court's opinion which immediately preceded the portion quoted in the letter of the Secretary of Transportation, *viz.* (272 F.Supp. 226, 231):

> ". . . Given the necessary effect of the ordinance as it applies to interstate and international *aircraft flights in the navigable air space* surrounding Kennedy Airport, it must be concluded on the present record that the ordinance is invalid." (Italics added).

So it is abundantly clear that the "area committed to Federal care" was, in the opinion of the District Court, the *navigable air space*. Even this support for the views expressed by the Secretary of Transportation and the Federal Aviation Administrator, upon which the Appellees and their *amici* rely, was removed when, on appeal, the Court of Appeals for the Second Circuit refused to hold that Congress had preempted the field of aircraft noise abatement (398 F.2d 369, 376)[8] and this Court denied certiorari (393 U.S. 1017).

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[8]The Court of Appeals for the Second Circuit also had this to say (footnote 4):

> "But the problem arises that it is this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; *another noise ordinance might not have that effect.*" (Italics added).

4. Noise Control Act of 1972.

Possibly the most transparent of the efforts of the Appellees and their *amici* is the attempt to support their preemption arguments by reference to the legislative history of the Noise Control Act of 1972 (Pub. L. No. 92-574, 86 Stat. 1234) and various statements made by members of the House and Senate during the course of its enactment. The Senate Report (Public Works Committee) No. 92-1160, September 19, 1972, and the minority views of Senator Muskie,[6] which accompanied Senate Bill 3342 are of no value in the determination of Congressional intent, since that bill was not enacted. The House Report (Interstate and Foreign Commerce Committee) No. 92-842, February 19, 1972, which accompanied House of Representative Bill 11021, has some pertinence. While the Appellees and the Port Authority of New York and New Jersey quote a small portion of this report in their briefs, they have neglected to bring to the Court's attention the following portion (p. 9):

> "*Localities are not preempted from the use of their well-established powers to engage in zoning, land use planning, curfews and other similar requirements.* For example, the recently-enacted Chicago Noise Ordinance provides that heavy equipment for construction may not be used between 9:30 p.m. and 8:00 a.m. within 600 feet of a hospital or residence except for public improve-

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[6]One of the *amici* (National Business Aircraft Association, Inc.) goes so far as to suggest that Mr. Muskie's views also related to the *final* version of H.R. 11021 (See p. 56 of its brief). Nothing could be further from the truth. Mr. Muskie was referring to the final version of S. 3342 which was considered and rejected by the House on October 18. 1972 (See 118 Cong.Rec. (daily ed. Oct. 18, 1972) No. 169, pp. H. 10287, *et seq.*).

ment or public service utility work. The ordinance further provides that the motor of a vehicle in excess of four tons standing on private property and within 150 feet of residential property may not be operated for more than two consecutive minutes unless within a completely enclosed structure. Such local provisions would not be preempted by the Federal Government by virtue of the reported bill.

"The Committee gave some consideration to the establishment of a Federal ambient noise standard, but rejected the concept. *Establishment of a Federal ambient noise standard would in effect, put the Federal government in the position of establishing land use zoning requirements on the basis of noise—i.e., noise levels to be permitted in residential areas, in business areas, in manufacturing and residential areas; and within those areas for different times of the day or night. It is the Committee's view that this function is one more properly that of the States and their political subdivision,* and that the Federal Government should provide guidance and leadership to the States in undertaking this effort." (Italics added).

The National Business Aircraft Association, Inc., in its brief, attempts to avoid this evidence of Congressional intent (see p. 53), but in contradiction of this effort favor us with a portion of the legislative history of the Federal Aviation Act of 1958 which clearly indicates that Congress by that enactment did not intend to assume control of the ground (see p. 33). The above quoted portion of the House Report is found under the heading "Responsibilities of the Federal Government,

the States, and their Political Subdivisions in Abating and Controlling Noise". We submit that it lends support to our contention that Congress has not preempted the ability of a municipality to enact and enforce reasonable and necessary land use regulations to protect their residents from the nuisance of jet aircraft noise during the hours normally devoted to sleep (see Appellants' Br., p. 57).

Whatever may be the proper construction and meaning of the House Report, the fact remains that both Houses of Congress specifically considered the question as to whether States and local governments should be preempted from prescribing and enforcing noise emission standards for aircraft and aircraft engines. The Senate Bill (S. 3342), which contained this preemptive provision, was read and considered by the House on October 18, 1972 (118 Cong.Rec. (daily ed. October 18, 1972) No. 169, pp. H. 10287, *et seq.*). It was rejected by the House in favor of H.R. 11021 which had been at that time amended to include three provisions of Senate Bill 3342. Included were the substance of the provisions of the Senate bill which preempted the right of States and political subdivisions to control, license, regulate or restrict the use, operation or movement of surface carriers (railroads and motor carriers) unless the Administrator of the Environmental Protection Agency determined that such were necessitated by special local conditions or not in conflict with regulations promulgated by him[7] *The preemptive provision of the Senate bill relating to aircraft and air-*

[7]Compare Sections 513 and 523 of S. 3342 (118 Cong.Rec. (daily ed., Oct. 18, 1972) No. 169 at p. H. 10294) with Sections 17(c)(2) and 18(c)(2) of H.R. 11021 (*Id.* at pp. H. 10299, H. 10300).

craft engines was not included.[8] Nor were the preemptive provisions relating to surface carriers extended to include air carriers. Clearly, the question was before the House. It chose to preempt in one area (surface carriers) and rejected preemption in the other area (air carriers). It is doubtful that there could be more conclusive evidence of Congressional intent. Its force cannot be diminished by reference to Committee reports or statements of members of the House and Senate.

When the action of the House was reported to the Senate, H.R. 11021 as amended was read and considered by the Senate.[9] The Senate concurred.[10] Senator Tunney took comfort from the fact that the House had included some of the provisions of the Senate bill, particularly the preemptive provisions relating to surface carriers.[11] While there is no doubt

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[8]S. 3342, Sec. 505: "No State or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof." (*Id.* at p. H. 10293).

[9]118 Cong.Rec. (daily ed., Oct. 18, 1972) No. 169, at pp. S. 18638 *et seq.*

[10]*Id.* at p. S. 18646.

[11]*Id.* at p. S. 18645. In that regard Senator Tunney stated:

> ". . . the House has accepted the Senate proposal which authorizes the Environmental Protection Agency to establish regulations for control of noise from interstate carriers, including railroads, trucks and buses. The purpose of the amendment is to reduce the impact of conflicting State and local noise controls on interstate carriers.
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> "I would stress, Mr. President, that the preemption provided in these sections only occurs in areas of regulation where adequate Federal regulations are in effect. And, equally important, Mr. President, is that Federal regulations must be stringent enough to meet the varying local conditions affected by interstate carriers. Not only must the Administrator establish regulations which protect public health and welfare from noise from these interstate carriers in the average situation but he must also design his regulations so that the public health and welfare is protected

that Senator Tunney and a majority of the Senate preferred the Senate bill, the bill which became law was H.R. 11021.

5. Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.

Appellees seek to blunt the effect of this Court's decision in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), by quoting a portion of a statement made in one of the footnotes and then misstating the effect and meaning of the remainder (see Appellees' Br., p. 63). The entire footnote is as follows (*Id.*, at 724, n. 22):

> "22. If the federal authorities seek to deal with discrimination in hiring practices and their power to do so is upheld, that would raise questions not presented here. Compare California v Thompson, 313 U.S. 109, 85 L ed 1219, 61 S Ct 930 (1941), with California v Zook, 336 US 725, 93 L ed 1005, 69 S Ct 841 (1949)."

Both of the decisions to which the Court referred *sustained* California statutes as against a claim of Federal preemption. In *Zook* the California statute substantially duplicated a provision in the Federal Motor Carrier Act by prohibiting the sale or arrangement of any transportation over the public highways of the

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regardless of the location in which the interstate carrier is operating.

"The Administrator is permitted to take into account special local considerations and waive the application of the preemption provision to assure that public health and welfare is protected. In addition, he may waive the application of preemption where local regulations are not in conflict with Federal regulations, as where local law requires lower speeds or different operating procedures, or modifications of routing."

State if the transporting carrier had no permit from the Interstate Commerce Commission (336 U.S. at 726-727). In *Thompson* the California statute required a license and bond of agents engaged in the business of selling transportation over the public highways of the State (313 U.S. at 111).

To put this matter in proper perspective, paraphrasing the Court's footnote in the terms and circumstances of this case would be helpful, namely: If the federal authorities seek to deal with airport proprietors "with respect to the permissible level of noise that can be created by aircraft using their airports"[12] and their power to do so is upheld, that would raise questions not presented here.

6. Braniff Airways v. Nebraska State Board.

Braniff Airways v. Nebraska State Board, 347 U.S. 590 (1954), cannot be summarily dismissed as being "inapposite" (See Appellees' Br., p. 63). The Court in that case first made reference to a provision in the Air Commerce Act of 1926[13] carried over in the Civil Aeronautics Act of 1938[14] wherein "The United States is declared to possess and exercise complete and exclusive sovereignty in the air space above the United States . . ."[15] and the further provision of the 1938

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[12]34 Federal Register 18355-18356, Nov. 18, 1969, now 14 C.F.R. §36.5. See Appendix to Brief of Appellants, p. 3.

[13]44 Stat. 568, 572, §6.

[14]52 Stat. 973, 977, 1038, §1107(i)(3), 49 U.S.C. §176(a).

[15]Now §1108(a) Federal Aviation Act of 1958, 49 U.S.C. §1508(a).

Act[16] which declared "a public right of freedom of transit" through the navigable air space.[17] The Court then observed as follows (347 U.S. at 595-596):

> "The provision pertinent to sovereignty over the navigable air space in the Air Commerce Act of 1926 was an assertion of exclusive national sovereignty. The convention between the United States and other nations respecting international civil aviation ratified August 6, 1946, 61 Stat 1180, accords. *The Act, however, did not expressly exclude the sovereign powers of the states.* HR Rep No. 572, 69th Cong. 1st Sess, p. 10. The Civil Aeronautics Act of 1938 gives no support to a different view. After the enactment of the Air Commerce Act, more than twenty states adopted the uniform Aeronautics Act. It had three provisions, indicating that the states did not consider their sovereignty affected by the National Act except to the extent that the states had ceded that sovereignty by constitutional grant. The recommendation of the National Conference of Commissioners on Uniform State Laws to the states to enact this Act was withdrawn in 1943. Where adopted, however, it continues in effect. See United States v. Praylou (CA4th SC) 208 F2d 291. Recognizing this 'exclusive national sovereignty' and right of freedom in air transit, this Court in United States v. Causby, 328 US 256, 261, 90 L ed 1206, 1210, 66 S Ct 1062, nevertheless held that the owner of land might recover for a taking by national use of navigable air space, resulting in destruction in whole or in part of the usefulness of the land property." (Italics added).

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[16]52 Stat. 980, §3, 49 U.S.C. §403.

[17]Now §104, Federal Aviation Act of 1958, 49 U.S.C. §1304.

The relevance of this decision is underscored by the fact that Congress in enacting the Federal Aviation Act of 1958 and subsequent amendments "did not expressly exclude the sovereign powers of the states" and the provisions of the aviation Acts which the Court considered are now found in the Federal Aviation Act of 1958. One of these was inferentially relied upon by the Court of Appeals in reaching its decision in this case.[18]

7. Head v. New Mexico Board of Examiners.

Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963), cannot be thrust aside as not being "analogous" (See Appellees' Br., pp. 63-64). This important case established four governing principles, each of which has a substantial bearing on the determination of the preemption issue. *First*, the validity of a claim of Federal preemption "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation" (374 U.S. at 429). *Second*, the question to be decided is "whether Congress and *its commissions acting under it have so far exercised* the exclusive jurisdiction that belongs to it as to exclude the State" (*Id.*). *Third*, the question "must be answered by a judgment on the particular case" (*Id.*). *Fourth*, a State statute "directly addressed to protection of the public health" (*Id.* 428), must be upheld as against a claim of Federal preemption "*at least* so long as any power the [Commission] may have remains 'dormant and unexercised' " (*Id.* 432). (Italics added).

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[18] §104, Federal Aviation Act of 1958, 49 U.S.C. §1304, which declares "a public right of freedom of transit through the navigable airspace of the United States." See Opinion of the Court of Appeals, A. 427, footnote 12.

8. Rice v. Chicago Board of Trade.

Rice v. Chicago Board of Trade, 331 U.S. 247 (1947), is dismissed by the Appellees with the cryptic statement that "the Court merely determined that the Commodity Exchange Act . . . did not evidence a congressional intent to make its regulatory features exclusive in the area" (Appellees' Br., p. 64). Again, this important decision cannot be so summarily dismissed. All of the elements which Appellees claim to be decisive on the question of Federal preemption in this case were present there, as revealed by the following excerpts from the Court's opinion (331 U.S. at 250, 252):

> "The Commodity Exchange Act provides comprehensive regulation of trading in futures on commodity exchanges which are designated as 'contract markets' by the Secretary of Agriculture. The Secretary is authorized to designate any board of trade as a contract market on its compliance with prescribed terms and conditions. §5, 7 USCA § 7, 2 FCA title 7, § 7. The Chicago Board of Trade has been so designated. The Act contemplates that each contract market will adopt rules governing transactions in futures contracts."
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> * * *
>
> "The Secretary has promulgated numerous rules and regulations covering a variety of subjects pertaining to contract markets and their activities."

The Court additionally observed as follows (*Id.* 253):

> "But there is not contained in the Commodity Exchange Act, as there is in the United States Warehouse Act, see Rice v. Santa Fe Elevator Corp. [331 US 218, ante, 1447, 67 S Ct 1146]

supra, a declaration by Congress that the system which it has adopted for the regulation of trading on contract markets is exclusive of state regulation."

Other relevant portions of the Court's opinion are set forth in our brief (p. 49). We would add to them the following statement, which appears in the footnote (331 U.S. at 254, n. 6):

> "In the second place, Congress by granting the Board of Trade freedom to regulate within this narrow field has by that very act negatived any inference that the Federal Government has preempted it by requirements of its own."

9. Effects of Jet Aircraft Noise Pollution.

Contrary to Appellees' suggestion (Appellees' Br., footnote, p. 68), the information which we have provided in our brief regarding the adverse effects of noise in general, and jet aircraft noise in particular, was not for the purpose of refuting the position taken by the Court of Appeals on the conflict issue. The information was included so that this Court would be fully apprised as to the seriousness of the problem[19] and the need for immediate relief—relief which the Federal Aviation Administration has refused to provide. The effects of the severe noise pollution created by operations at the Hollywood-Burbank Airport are but a part of the picture. While the Port Authority of

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[19]This Court is not unfamiliar with the effects of aircraft noise. *United States v. Causby*, 328 U.S. 256 (1946), and *Griggs v. Allegheny County*, 369 U.S. 84 (1962) provide graphic descriptions of the impact of aircraft noise prior to the dawn of the jet age. In *Causby* the residence was 2275 feet from the end of the runway and the barn which housed the chickens, 2220 feet (*Id.* 266). In *Griggs* the residence was 3,250 feet from the end of the runway (*Id.* 89).

New York and New Jersey takes great credit in its brief (p. 3, footnote 3) for having established noise limits on aircraft which may use its airports (112 PNdb), we find from the record in this case that the measurement is taken at the point nearest the runway *where there is a residence* (A. 300). It is small wonder that the governing bodies of Cedarhurst and Hempstead attempted to provide some relief for their residents.[20]

There was of course no need to establish that the Burbank ordinance was reasonable and not unduly restrictive, not only because this issue was withdrawn from the District Court's consideration,[21] but also because the very enactment of the ordinance furnished *prima facie* evidence of those facts and conditions which made the ordinance reasonable and necessary.[22]

10. Southern Pacific Co. v. Arizona.

Appellees have liberally used *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), in an attempt to support their various contentions (Appellees' Br., pp. 71 *et seq.*). By taking statements in that case out of context they claim support for two propositions: (1) that because of the need for national uniformity, regulations such as the Burbank ordinance, if imposed at all, must be "prescribed by a single authority" at the national level (*Id.* 73-76), and (2) the ordinance

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[20]See *Allegheny Airlines Inc., v. Cedarhurst*, 238 F.2d 812 (2d Cir. 1956); *American Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967) and 398 F.2d 369 (2d Cir. 1968).

[21]See A. 66-67 and Rp. Tr. 433-438.

[22]A presumption of constitutionality attaches. *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935). Presumptions of law are proof. *Smith v. St. Louis & Southwestern Railway Company*, 181 U.S. 248 (1901).

must be tested "as if imposed on a nation-wide basis" (*Id.* 77).

The decision supports neither of these propositions. As to the first proposition, what the Court said was this (325 U.S. at 770-771):

> "Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."

To be sure that there was no misunderstanding, this was reiterated further on in the opinion (*Id.* 775-776):

> "The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts."

There was of course no need in this case to "weigh" the effect of the Burbank ordinance, since the Ap-

pellees made no showing that it burdened or interfered with interstate commerce in any respect. Beyond this, it is clear from the foregoing that had the majority of the Court been convinced (as the dissent was) that the Arizona statute would have achieved a significant reduction in accidents and casualties, it would have sustained the statute, even though the uniformity of the interstate train journey was affected.

The second proposition is likewise completely unsupported by this decision. The Court did not test the Arizona statute "as if imposed on a nation-wide basis". Obviously, if the train length provisions of that statute were imposed on a nation-wide basis the uniformity of the interstate journey would not have been affected at all. The only part the regulations of other States played in the Court's consideration was that if such other regulations did "not prescribe the same maximum limitations" on train lengths (325 U.S. at 775), it would be necessary to break up and reassemble trains to conform to these differing regulations as the train proceeded from State to State on its interstate journey. Nothing of even a remotely similar nature was involved in this case. The other decisions cited by the Appellees involved the same consideration (Appellees' Br., pp. 72, 77).[23] Appellees' argument was effectively put to

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[23]The Appellees also cite (at pp. 78-79) *Railroad Company v. Husen*, 95 U.S. 465 (1877). This case was distinguished, if not impliedly overruled, in *Smith v. St. Louis & Southwestern Railway Company*, 181 U.S. 248 (1901), where the Court sustained quarantine regulations established by the Governor of the State of Texas which prohibited the importation of cattle from the State of Louisiana for a certain period when anthrax was prevalent.

rest in *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963).[24]

Conclusion.

As evidenced by the *amicus* briefs which have been filed on behalf of the Appellees, almost all components of the air transportation industry are now represented: interstate air carriers (ATA); intrastate air carriers (PSA); major airports (Port Authority of New York and New Jersey); smaller airports (Lockheed); aircraft manufacturers (Lockheed);[25] business aircraft (NBAA) and airline pilots (ALPA). The depressing aspect of this opposition is that each seeks to promote its own selfish interests. Each wishes to be free of control. The Port Authority wants no interference with its right to exclude aircraft on the basis of noise in order to avoid or reduce money damage claims. The air carriers oppose the imposition of retrofit requirements because of the dollar cost. If Lockheed is any example, airport proprietors would prefer to use the property of others without paying for it. So would the airlines. The question therefore remains: Who will protect the People? In the absence of appropriate and effective Federal regulation, the answer must be: States, local governments and the Courts.

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[24]See Appellants' Br., pp. 63-64. *Southern Pacific Co. v. Arizona, supra*, 325 U.S. at 765-766, supports the rule enunciated in *Colorado Anti-Discrimination Commission, supra*, and *Head, supra*, that a State statute will be upheld as against a claim of Federal preemption "at least so long as any power the [Commission] may have remains 'dormant and unexercised'" (*Head*, 374 U.S. 424, at 432).

[25]Lockheed Air Terminal, Inc., is a wholly owned subsidiary of Lockheed Aircraft Corporation (A. 99, 438).

Respectfully submitted,

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